92-2005

Case No. _____

FILED
JUN 14 1993
OFFICE OF THE CLERK

In the United States Supreme Court

1992 TERM

WILLIAM E. GLEASON,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH DISTRICT OF OHIO, SUMMIT COUNTY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

At a suppression hearing, the trial court found that the state had deceptively induced the defendant's wife into granting consent to search the defendant's home. The evidence was suppressed accordingly. On appeal, the Court of Appeals for the Ninth District of Ohio overturned the suppression and held that, in Ohio, police deception is an irrelevant consideration in the determination of whether valid consent was obtained. The Ohio Supreme Court declined to hear an appeal.

The question presented for review is whether the Fourth Amendment disentitles a trial court from considering manifestly deceptive and misleading police tactics in its determination of whether a consent to search was given freely and voluntarily.

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OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

Both the Court of Common Pleas, Summit County, Ohio, and the Court of Appeals for the Ninth District of Ohio delivered opinions in this case. Both opinions are unreported and are reproduced verbatim in the appendix of this petition for writ of certiorari.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The date of the entry of the judgment of the Court of Appeals for the Ninth District of Ohio is November 4, 1992; the entry by which the Supreme Court of Ohio declined discretionary review of the Petitioner's case is dated March 17, 1993. This petition is filed pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States.

The statutory provision conferring jurisdiction upon the Supreme Court of the United States to review the judgment of the Court of Appeals for the Ninth District of Ohio is 28 U.S.C. Section 1651(a).

THE CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV

STATEMENT OF THE CASE

On November 4, 1991 at approximately 6:50 A.M., three law enforcement officers from the Summit County, Ohio, Sheriff's Department attempted to serve a capias upon the Petitioner, William E. Gleason. The Petitioner had been secretly indicted on four counts of rape and four counts of sexual imposition stemming from allegations from the alleged victims. Upon arriving at the Petitioner's home, the officers informed Mrs. Marsha Gleason, the Petitioner's wife, that they were present to arrest her husband on charges of rape. After learning that Mr. Gleason was not present, the officers asked Mrs. Gleason for permission to look around the home. More specifically, the officers asked for permission to search for sexually explicit snapshot photographs of the alleged victims. The photos were allegedly taken in 1984 or 1985 when the alleged victims were children.

Prior to November 4, 1991, however, the officers interviewed the alleged victims. During these interviews, the officers were told that the Petitioner had shown them certain 8 mm motion picture films and certain books prior to the alleged sexual offenses. The alleged victims also told the officers the specific location of the books, films, and projector upon which the films were allegedly viewed.

On the morning of November 4, 1991, however, the officers never informed Mrs. Gleason that they were looking for items other than the snapshots. In response to the officers' request to search for the snapshots of the alleged victims, Mrs. Gleason informed the officers that she had nothing to hide with respect to the alleged snapshots. Thus, she permitted the officers to search her home for the snapshots. Confiscated during the search, among other items, were twenty-five 8 mm motion picture films, an 8 mm projector, and certain books and magazines. The alleged snapshots were never found.

The Petitioner pleaded not guilty to the rape and sexual imposition charges and the case was assigned to the Honorable Frank J. Bayer, Judge of the Summit County Court of Common Pleas.

Prior to trial, the Petitioner filed a motion to suppress, asserting that the books, motion picture films, and the projector had been seized in violation of the Petitioner's rights under the Fourth Amendment of the United States Constitution, thus raising the federal question now sought to be reviewed. (See "Petitioner's Motion to Suppress and Return Tangible Property," Appendix.) Specifically, the Petitioner argued that the state's warrantless search of his home was not executed pursuant to a valid consent. The trial court sustained the Petitioner's

motion to suppress. In its Judgment Order, the trial court made findings of fact and law and explained, *inter alia*, that

> [t]he problem with the entire search conducted by the officers is that knowing precisely what they were looking for and where to find these items they arrived without a search warrant and now rely on what they claim is consent by Mrs. Gleason.
>
> Officer Limbert testified that they did not obtain a search warrant because the police felt "they had a time problem." The Court construed this to mean that a neutral magistrate would refuse to issue a search warrant for the materials seized as no probable cause existed to believe such items would still be in the Defendant's home in the place indicated by the children after the passage of so many years.
>
> The officers hoping items would still be located in the Defendant's home misled the Defendant's wife into believing they were only looking for photographs involving the children. No mention was made to her about the 8 mm projector and films, nor the comic books of which one must presume she was aware were kept in the home by the Defendant. (See "Trial Court's Judgment Order," Appendix.)

On May 18, 1992, the State of Ohio appealed the trial court's decision to the Court of Appeals for the Ninth District in Ohio. On November 4, 1992, the Court of Appeals reversed the judgment of the trial court and remanded the case. (See "Opinion of the Court of Appeals," Appendix.) On December 24, 1992, the Petitioner filed his Notice of Appeal and his Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. The federal question sought to be reviewed by this Court was again raised in the Petitioner's first Proposition of Law in his Memorandum in Support of Jurisdiction to the Ohio Supreme Court. (See "Petitioner's Proposition of Law Before the Supreme Court of Ohio," Appendix.) The Supreme Court of Ohio declined to hear the Petitioner's appeal and issued an Order to that effect on March 17, 1993. (See "Journal Entry of the Supreme Court of Ohio," Appendix.) The Petitioner now offers this Petition for Writ of Certiorari to the United States Supreme Court.

ARGUMENT

The Court of Appeals for the Ninth District of Ohio has decreed that, in the state of Ohio, police officers may lie to procure a consensual search of a home and that the Fourth Amendment disentitles a trial court from considering manifestly deceptive and misleading police tactics in its determination of whether a consent to search was given freely and voluntarily. The Petitioner submits that the Court of Appeals holding decides a federal question in a way that conflicts with applicable decisions of the Supreme Court and the law of the land.

In its review of the trial court's suppression order, the Court of Appeals has held that even where a trial court finds that deceptive police tactics had elicited a consent to search a home, such tactics are nevertheless irrelevant in the determination of whether the consequent consent was given "freely and voluntarily." The Court of Appeals ruled that the trial court's inquiry into the state's manifestly deceptive tactics was an improper examination of the police officers' "subjective intent" and reversed the trial court's suppression of evidence. However, a cursory examination of the trial court's Judgment Order reveals that the trial court's decision to suppress was based upon an examination of the totality of the circumstances, including the facts and circumstances known to the officers. Such an inquiry is fully consistent with decisions of the United States Supreme Court. Indeed, the holdings of *Schneckloth v. Bustamonte*, (412 U.S. 218 (1973)) and *Scott v. U.S.*, (436 U.S. 128 (1977)) require that the trial court examine the "totality of circumstances" to determine whether a consent was given voluntarily and to objectively assess a police officer's conduct "in light of the facts and circumstances then known to him." By prohibiting trial courts from considering facts and circumstances well within the parameters set by *Schneckloth* and *Scott*, the Court of Appeals has made unconstitutional the evaluation of facts and circumstances that must, according to the United States Supreme Court, be evaluated. Thus, the Court of Appeals's decision conflicts with applicable decisions of the United States Supreme Court and prevents trial courts from properly considering manifestly deceptive state tactics in their determination of whether a consent to search was given "freely and voluntarily."

Why the Court of Appeals Decision is Contrary to the Decisions of the United States Supreme Court

Searches and seizures inside the home, without a warrant, are presumptively unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). To rely on the consent exception to warrant requirement, the state must show by "clear and positive" evidence that the consent was "freely and voluntarily" given. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Voluntariness is a question of fact to be determined by the totality of circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The reasonableness of an officer's actions is to be assessed objectively, and in light of the facts and circumstances then known to him. Specifically, the issue is whether the facts available to the police officer at the moment of the search would warrant a man of reasonable caution in the belief that the action taken was appropriate. *Scott v. U.S.*, 436 U.S. 128, 137 (1977).

There is considerable support for the proposition that deceptive practices by the state will vitiate any consent elicited by those practices. In *State v. Pi Kappa Alpha Fraternity*, the Ohio Supreme Court held that consent obtained through deception cannot be said to have been given freely and voluntarily. 23 Ohio St.3d 141, 144, 491 N.E.2d 1129, 1131-32 (1986). Likewise, in *Alexander v. U.S.*, the U. S. Court of Appeals for the Fifth Circuit scrutinized a search where the police deceived the defendant into believing that they were looking for a small item of jewelry, when they were actually interested in finding marked currency. 390 F.2d 101, 103 (5th Cir. 1968). The Fifth Circuit held that the defendant's consent to search was the product of deception and suppressed the seized currency from evidence. The Fifth Circuit stated that "[i]ntimidation and deceit are not the norms of voluntarism. In order for the response to be free, the stimulus must be devoid of mendacity." *Id.* at 110. *See also U.S. v. Davis*, 749 F.2d 292, 294-97 (5th Cir. 1984) and *U.S. v. Andrews*, 746 F.2d 247, 248-50 (5th Cir. 1984), both more recent decisions holding that police deception is a relevant factor in determining valid consent.

In the instant case, the police officers' deceptive tactics were manifest. Officer Jennifer Limbert testified that she and her fellow officers anticipated finding the projector, books, and 8 mm motion picture films ultimately seized. Officer Limbert testified further, however, that she and her fellow officers believed that they would be unable to obtain a warrant for these items. Officer Limbert testified that she and her fellow officers told Mrs. Gleason only that they were looking for alleged snapshots of the alleged victims. Officer Limbert testified that she and her fellow officers made no mention of those other items. Officer Limbert admitted that she and her fellow officers

searched not only in areas where they thought the snapshots might be, but also in areas they thought the projector, books, and motion picture films might be. Officer Limbert admitted that the snapshots were never found but that the projector, books, and motion picture films were found, and seized, within the scope of the search for the still undiscovered snapshots.

The trial court weighed the evidence. It measured the credibility and demeanor of the witnesses. It reviewed the "totality of circumstances" and concluded that

> [t]he problem with the entire search conducted by the officers is that knowing precisely what they were looking for and where to find these items they arrived without a search warrant and now rely on what they claim is consent by Mrs. Gleason.
>
> Officer Limbert testified that they did not obtain a search warrant because the police felt "they had a time problem." The Court construed this to mean that a neutral magistrate would refuse to issue a search warrant for the materials seized as no probable cause existed to believe such items would still be in the Defendant's home in the places indicated by the children after the passage of so many years.
>
> The officers, hoping items would still be located in the Defendant's home, misled the Defendant's wife into believing they were only looking for photographs involving the children. No mention was made to her about the 8 mm projector and films, nor the comic books of which one must presume she was aware were kept in the home by the Defendant. (See "Trial Court's Judgment Order," Appendix.)

On appeal, the Court of Appeals for the Ninth District of Ohio overturned the decision of the trial court. Citing a Seventh Circuit opinion (*U.S. v. White*, 706 F.2d 806 (7th Cir. (1983)), the Court of Appeals asserted that the "subjective intent of the officers as to what they were searching for when they asked for consent ... is immaterial." Applying this standard, the Court of Appeals ruled that it was improper for the trial court to even consider those police tactics the trial court found "misleading." Having discarded these tactics from the analysis, the Court of Appeals determined that Mrs. Gleason's consent was both free and voluntary. Consequently, the trial court's suppression was overturned.

In its opinion, the Court of Appeals fails to explain why the trial court's decision to suppress necessarily involved an inquiry into the officers' subjective intent. On the contrary, the trial court, as mandated by *Schneckloth*, considered the "totality of circumstances" and found that the officers' actions had misled Mrs. Gleason into

granting consent and that these misleading actions had poisoned the "free and voluntary" atmosphere necessary for a valid consent. Further, the trial court, as mandated by *Scott*, objectively assessed the officers' conduct "in light of the facts and circumstances then known to [them]" and found their conduct to be constitutionally infirm. In short, the trial court's inquiry was an objective one, fully consistent with the standards enunciated by the United States Supreme Court.

Thus, the error of the Court of Appeals is apparent. By prohibiting the trial court from considering facts and circumstances well within the parameters set by *Schneckloth* and *Scott*, the Court of Appeals has made unconstitutional the evaluation of facts and circumstances that must, according to the United States Supreme Court, be evaluated. Consequently, the Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of the United States Supreme Court.

Why Any Consent to Search a Home Elicited by Deceptive State Action is Repugnant to the Fourth Amendment

The very text of the Fourth Amendment of the United States Constitution requires that warrants will only issue if they "particularly describ[e] the place to be searched, and the ... things to be seized." *U.S. Const. amend. IV.* Further, the warrant must be based upon information provided under oath. *Id.* While the Petitioner recognizes that a consensual search is an established exception to the warrant requirement, he vigorously disputes the notion that consent obtained through trickery and deceit does not violate the basic tenets of the Fourth Amendment. Indeed, it defies logic to think that the Fourth Amendment prohibits state deception in the presence of a magistrate, while at the same time condoning those same practices in the presence of ordinary citizens. By disentitling a trial court from considering those facts and circumstances which reveal deceitful police practices, the Court of Appeals has not only ignored this Court's precedent, it has also placed beyond judicial review state tactics that are manifestly inconsistent with the language of the Fourth Amendment.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT OF OHIO
SUMMIT COUNTY

Case No. 15749

APPEAL FROM THE JUDGMENT ENTERED IN THE
COMMON PLEAS COURT
SUMMIT COUNTY, OHIO

(Case No. 91-10-2388)

STATE OF OHIO,
Plaintiff-Appellants

vs.

WILLIAM E. GLEASON,
Defendant-Appellee

DECISION AND JOURNAL ENTRY

Dated: November 4, 1992

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

COOK, J. On November 4, 1992, officers of the Summit County Sheriff's Department went to the home of William Gleason ("Gleason") to arrest him on four counts of rape and four counts of gross sexual imposition. The alleged offenses were committed six or seven years earlier. The victims were the minor children of a former girlfriend.

When the officers arrived at Gleason's house Gleason had already left for work. Gleason's wife claims she was awakened by noises and when she went to investigate she was surprised to discover that the officers had entered her home. The police claim they were invited in by Gleason's wife. The officers told Mrs. Gleason that they had come to arrest her husband and that they wanted to search the house for pictures of the children. Mrs. Gleason stated that they had

nothing to hide and told the officers that they could search the house. Mrs. Gleason also signed a consent to search form. The form stated that she had been informed of her right to refuse the search. The form also included the following language: "This written permission is being given by me to the above named officers voluntarily and without threats or promises of any kind." Prior to signing the form the officers explained to Mrs. Gleason that she had the right to refuse the request to search but that if she did, they would come back with a search warrant.[1]

The officers searched the house and found and seized the following items: 8mm pornographic films, a projector, pornographic magazines, comic books and other assorted materials. The officers seized these items because Gleason's alleged victims told the police that Gleason required them to watch dirty movies and read dirty magazines prior to photographing them in sexual positions. The victims also told police that the films and magazines were kept in Gleason's bedroom and the photographs were concealed in comic books in the basement.

Gleason was indicted on four counts of rape, four counts of gross sexual imposition and two counts of disseminating matter harmful to juveniles. Gleason pled not guilty and moved to suppress the items seized. The trial court granted that motion to suppress. The state now appeals asserting one assignment of error. We reverse.

Assignment of Error

"The trial court committed error when it suppressed the evidence in this case."

An exception to the requirements of both a warrant and probable cause is a search which is conducted pursuant to consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219, 36 L.Ed.2d 854, 858. Consent to search must be voluntarily given, however it need not be knowing and intelligent as required for a waiver of rights. *Id.* at 248-49, 36 L.Ed.2d at 875. Voluntariness is found where, from the totality of the circumstances, it appears that the consent was not the product of governmental coercion. *Id.* A consent search cannot exceed the parameters of the consent given. *Walter v. United States* (1980), 447 U.S. 649, 656-57, 65 L.Ed.2d 410, 417-18.

The state contends that the trial court's error is in its finding that the search exceeded the consent given.

---

[1] This court has held that a police officer's statement that he is going to obtain a search warrant does not vitiate a person's voluntary consent. *State v. Simmons* (Mar. 22, 1989), Summit App. NMo. 13790, unreported.

In its judgment entry granting the motion to suppress, the trial court stated:

> "The problem with the entire search conducted by the officers is that knowing precisely what they were looking for and where to find these items they arrived without a search warrant and now rely on what they claim is consent by Mrs. Gleason.
>
> " ....
>
> "The officers hoping such items would still be located in the Defendant's home mislead the Defendant's wife into believing they were only looking for photographs involving the children. No mention was made to her about the 8 mm projector and films, nor the comic books of which one must presume she was aware were kept in the home by the Defendant.
>
> "Even though Mrs. Gleason signed a consent form to conduct a complete search of the property, such was limited to a search for photographs. Since the search exceeded the consent given, the consent was not freely and voluntarily given and the items taken must therefore be suppressed."

We first note that Mrs. Gleason did not testify that she believed the police were going to limit their search nor that she would have denied permission for a more expansive search. The consent form contains no limitation on the search. It authorizes the officers to "conduct a complete search of [Gleason's] property ...."

The court stated that the officers misled Mrs. Gleason into believing they were only looking for photographs involving the children. The subjective intent of the officers as to what they were searching for when they asked for consent to search the house is immaterial however. *United States v. White* (C.A. 7, 1983), 706 F.2d 806, 808. The proper standard is not the "subjective intent" of the officers but rather "a standard of objective reasonableness without regard to the underlying intent or the motivation of the officers involved." *Id.* citing *Scott v. United States*, 463 U.S. 128, 56 L.Ed.2d 168.

Applying this standard, we find no violation of the fourth amendment. Even with a finding that Mrs. Gleason consented only to a search for pictures, the search reasonably included looking in the basement and closet, where the seized items were found. In the search for pictures, the closet would have been opened and the basement would have been searched. See *White, supra.* Since the officers could reasonably consider that the pictures were in the places where the

seized items were found, the search was within the scope of Mrs. Gleason's consent. *Id.* See, also, *United States v. Scherer* (C.A. 7, 1982), 673 F.2d 176, 182, certiorari denied (1982), 457 U.S. 1120, 73 L.Ed.2d 1334.[2]

We, therefore, find that the court erred in granting the motion to suppress. The assignment of error is well taken.

The judgment of the trial court is reversed and the case is remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

/s/ DEBORAH COOK
FOR THE COURT

CACIOPPO, P. J.
REECE, J.
CONCUR

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[2] In *Scherer*, the court held that the fact that government agents who misrepresented their identities to gain entry to defendant's barn were aware, before the visit, that two submachine guns were in defendant's barn, did not take the case out of the consent exception to the warrant requirement.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO

(Case No. 92-2598)

(Filed March 17, 1993)

STATE OF OHIO,
Appellee,

v.

WILLIAM E. GLEASON,
Appellant.

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed *sua sponte* for the reason that no substantial constitutional question exists therein.

(Court of Appeals No. 15749)

/s/ THOMAS J. MOYER
Chief Justice

TRIAL COURT'S JUDGMENT ORDER

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

(Filed May 18, 1992)

STATE OF OHIO
Plaintiff

-vs-

WILLIAM E. GLEASON
Defendant

Case No. CR 91 10 2388

JUDGE BAYER

This matter is before the Court on the Defendant William Gleason's motion to suppress evidence seized from the Defendant's home without a search warrant.

Officers of the Summit County Sheriff's Department arrived at the Defendant's home on the morning of November 4, 1991 to arrest the Defendant who had been indicted for numerous sex offenses allegedly committed some six to seven years earlier upon the minor children of a former girl friend, who resided in the Defendant's home with her minor children at the time the alleged offenses had taken place.

When the officers arrived at the Defendant's home, the defendant had already left for work. The Defendant's wife, however, was present. She claims she was awakened by noises and when she went to investigate, she was startled to discover that one of the officers had entered her home without her permission and was proceeding up the stairs leading to the living room area. The police deny this and claim they were invited in by the Defendant's wife.

At any rate, a search of the premises was thereafter conducted without a search warrant. It is, however, claimed by the State that the search was conducted with the consent of Mrs. Gleason.

The sole issue for determination is did the Defendant's wife consent to a search of the home by the officers and if so, did the search extend beyond the consent given?

In order to prevail, the State must establish by clear and convincing evidence that the consent was freely and voluntarily given

and that it was not the result of duress or coercion and further that the search did not exceed the parameters or the consent given. *Bumper v. North Carolina* 391 U.S. 543 (1968); *U.S. v. Boukater* 409 F. 2d 537 (1969).

Mrs. Gleason testified she gave consent to search for photographs of the minor victims depicting them in sexual poses which the Defendant had allegedly taken some years earlier.

No such photographs were found, but the police seize other articles, including numerous 8mm pornographic films, a projector, pornographic magazine and comic book and other assorted materials. The 8mm film and projector were taken from the Defendant's bedroom and the pornographic comic book from the basement.

The significance of the 8mm film, projector, and magazine and comic book are that the children informed the investigating officers that they were required by the Defendant to watch dirty movies or read dirty magazines prior to the Defendant's photographing them in sexual positions; that the films and magazines were kept in the Defendant's bedroom and that the Defendant concealed the photographs in comic books in the basement.

Undoubtedly such evidence would have probative value in the State's case in that it would lend credibility to the testimony of the children that such events did, in fact, take place in the home and that such items as pornographic films, magazines and comic books were, in fact, found where the children claimed the Defendant kept them.

The problem with the entire search conducted by the officers is that knowing precisely what they were looking for and where to find these items they arrived without a search warrant and now rely on what they claim is consent by Mrs. Gleason.

Officer Limbert testified that they did not obtain a search warrant because the police felt "they had a time problem." The Court construed this to mean that a neutral magistrate would refuse to issue a search warrant for the materials seized as no probable cause existed to believe such items would still be in the Defendant's home in the places indicated by the children after the passage of so many years.

The officers hoping such items would still be located in the Defendant's home mislead the Defendant's wife into believing they were only looking for photographs involving the children. No mention was made to her about the 8mm projector and films, nor the comic books of which one must presume she was aware were kept in the home by the Defendant.

Even though Mrs. Gleason signed a consent form to conduct a complete search of the property, such was limited to a search for photographs. Since the search exceeded the consent given, the consent was not freely and voluntarily given and the items taken must therefore be suppressed. Furthermore, the officers cannot claim such items as being contraband or evidence of the Defendant's crime against the children in plain view.

The discovery of items in plain view must, in the first instance, be inadvertent. If discovery is anticipated or suspected, the seizure may only be made with a warrant. *Coolidge v. New Hampshire* 403 U.S. 443 (1971).

The Defendant's motion to suppress is sustained.

/s/ JUDGE FRANK J. BAYER

PETITIONER'S MOTION TO SUPPRESS AND RETURN TANGIBLE PROPERTY

IN THE COURT OF COMMON PLEAS SUMMIT COUNTY, OHIO

(Filed December 26, 1991)

STATE OF OHIO,
Plaintiff

vs.

WILLIAM E. GLEASON,
Defendant

CASE NO. CR. 91-10-2388

JUDGE FRANK J. BAYER

Now comes the Defendant, WILLIAM E. GLEASON, by and through counsel, and respectfully requests this Court to suppress and prohibit the prosecution from using any and all property seized during a search of the Defendant's residence as evidence against the Defendant for the following reasons:

1. Said search was conducted without a search warrant and, therefore, violated Defendant's fourth amendment rights under the United States Constitution.

2. Said search was conducted without the consent of the Defendant or a joint occupant of the residence and, therefore, violated Defendant's Fourth Amendment rights under the United States Constitution.

3. Any purported consent given by Marsha Gleason, joint occupant with and wife of Defendant, WILLIAM E. GLEASON, was not voluntary and, therefore, violated the Defendant's Fourth Amendment rights under the United States Constitution.

4. The property seized has no nexus to the crimes charged and, therefore, its seizure violated Defendant's Fourth Amendment rights under the United States Constitution.

5. The search of Defendant's residence was a general and exploratory search and, therefore, violated Defendant's Fourth Amendment rights under the United States Constitution.

Defendant further respectfully requests this court to order that all

property confiscated during said search be returned to Defendant pursuant to Criminal Procedure Rule 12(f) because he is entitled to lawful possession thereof.

WHEREFORE, Defendant prays that all property confiscated in the search be suppressed from evidence and returned to Defendant, or such other relief as this court deems just.

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PETITIONER'S PROPOSITION OF LAW BEFORE THE SUPREME COURT OF OHIO

Where a trial court finds that police officers have deliberately deceived a citizen into granting consent for a search of a home, such deception vitiates the free and voluntary requirement necessary for a lawful consensual search under the Fourth and Fourteenth Amendments of the U. S. Constitution and Section 14, Article 1 of the Ohio Constitution.

Supreme Court, U.S.
FILED
JUL 13 1993
OFFICE OF THE CLERK

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NO. 92-2005

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM E. GLEASON,
Petitioner

-vs-

STATE OF OHIO,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Do the police have to inform a Defendant's wife of all of the objects of their search in order for the Defendant's wife to properly consent to a search of her home.

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STATEMENT OF THE CASE

The Respondent agrees with the procedural posture set forth by the Petitioner but sets forth the following statement of the facts.

STATEMENT OF THE FACTS

On November 4, 1991, Detective Jennifer Limbert of the Summit County Sheriff's Office had a capias to arrest the Petitioner for four counts of Rape and four counts of Gross Sexual Imposition. At 6:50 a.m., Detective Limbert, Detective John Karabatsos and a uniformed officer went to 3749 Cottage Grove in Green Township, the residence of the Petitioner. After the detectives entered the Petitioner's residence they spoke to Marsha Gleason, the Petitioner's wife. Mrs. Gleason informed the Sheriff's detectives that the Petitioner was not home. The detectives told Mrs. Gleason that her husband was being arrested for the rape of certain minor children. The Detectives explained to Mrs. Gleason that they had interviewed the minor victims in this case and they indicated

that they had seen certain pornographic 8 millimeter movie films, pornographic comic books, and that nude pictures had been taken of them. After explaining the rape charges to Mrs. Gleason, Mrs. Gleason indicated she had nothing to hide and told the Sheriff's detectives that they could search her house. Mrs. Gleason signed a consent to search form before the detectives searched the Petitioner's house. Prior to signing the form, the detective specifically told Mrs. Gleason that she had the right not to allow the search of her home. The Sheriff's detectives subsequently searched the home of the Petitioner specifically limiting the search to the area were the children indicated the items could be found.

While the police were searching the Petitioner's house, the Petitioner called and spoke to the Sheriff's

detectives and arranged to turn himself in. During the conversation with the Petitioner, he never told the detectives to stop searching his house and Mrs. Gleason never stopped or limited the search of the house by the Sheriff's detectives. Mrs. Gleason testified for the defense and admitted that she signed the consent to search form. Mrs. Gleason indicated that she was intimidated by the fact that there were three people in her house at 7:00 a.m. in the morning and that she did not know what was going on.

SUMMARY OF ARGUMENTS

ARGUMENT I

THE POLICE DO NOT HAVE TO INFORM A DEFENDANT'S WIFE OF ALL OF THE OBJECTS OF THEIR SEARCH IN ORDER FOR THE DEFENDANT'S WIFE TO PROPERLY CONSENT TO A SEARCH OF HER HOME.

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THE POLICE DO NOT HAVE TO INFORM A DEFENDANT'S WIFE OF ALL OF THE OBJECTS OF THEIR SEARCH IN ORDER FOR THE DEFENDANT'S WIFE TO PROPERLY CONSENT TO A SEARCH OF HER HOME.

The Petitioner contends the police search in this case was improper because the police used deceptive tactics in obtaining consent to search the home. The State contends the police search of Petitioner's house was proper since the Petitioner's wife signed a consent form to search the house. In the case at bar, the Petitioner had been secretly indicted for the rapes of two children and Summit County detectives had a warrant for the Petitioner's arrest. The two child victims had told the detectives that the Petitioner had shown them 8 millimeter movies of teenagers performing sexual acts. The children also stated that the Petitioner would show them pornographic magazines and

comic books. The children indicated the Petitioner took nude snapshots of them. Finally, the children indicated where these items could be found. When the police arrived at Petitioner's home, they told Mrs. Gleason about the children's rape allegations and the names of the children. The detectives asked Mrs. Gleason if they could search her house for evidence including pictures of the children. The detectives did not explicitly tell Mrs. Gleason what other evidence they sought. They did inform Mrs. Gleason that she had the right to refuse a search of her house. Mrs. Gleason told the detectives she had nothing to hide and permitted the detectives to search her house. She then signed a consent to search form. The detectives then searched for nude photographs of the children and other evidence based upon the children's statements.

In order to determine whether a persons Fourth Amendment Rights have been violated, a person must give consent which is voluntary under the totality of the circumstances. State v. Childress, 4 Ohio St. 3d 217 (1983), Schneckloth v. Bustamonte, 412 U.S. 218 (1973). A person may give valid consent even if the person is not informed that he or she has a right to refuse to consent. State v. Morris, 48 Ohio App. 3d 137 (1988). Bustamonte at 249.

Here, the trial court ruled that Mrs. Gleason's consent was involuntary because the police did not inform her of all of the evidence they sought in their search:

> Officer Limbert testified that they did not obtain a search warrant because the police felt "they had a time problem." The Court construed this to mean that a

neutral magistrate would refuse to issue a search warrant for the materials seized as no probable cause existed to believe such items would still be in the Defendant's home in the places indicated by the children after the passage of so many years.

The officers hoping such items would still be located in the Defendant's home mislead the Defendant's wife into believing they were only looking for photographs involving the children. No mention was made to her about the 8mm projector and films, nor the comic books of which one must presume she was aware were kept in the home by the Defendant.

Even though Mrs. Gleason signed a consent form to conduct a complete

> search of the property, such was limited to a search for photographs. Since the search exceeded the consent given, the consent was not freely and voluntarily given and the items taken must therefore be suppressed.
>
> (Trial Court's Findings, p. 3-4).

The Ninth District Court of Appeals reversed the trial court's decision stating as follows:

> The court stated that the officers misled Mrs. Gleason into believing they were only looking for photographs involving the children. The subjective intent of the officers as to what they were searching for when they asked for consent to search the house is immaterial however. United States v. White (C.A. 7, 1983), 706 F.2d 806, 808. The

proper standard is not the "subjective intent" of the officers but rather "a standard of objective reasonableness without regard to the underlying intent or the motivation of the officers involved." Id. citing Scott v. United States, 436 U.S. 128, 56 L.Ed.2d 168.

Applying this standard, we find no violation of the Fourth Amendment. Even with a finding that Mrs. Gleason consented only to a search for pictures, the search reasonably included looking in the basement and closet, where the seized items were found . In the search for pictures, the closet would have been opened and the basement would have been searched. See White, supara. Since the officers could reasonably consider that the pictures were in

> the places where the seized items were found, the search was within the scope of Mrs. Gleason's consent. Id. See, also, United States v. Scherer (C.A. 7, 1982, 673 F.2d 176, 182, certiorari denied (1982), 457 U.S. 1120, 73 L.Ed.2d 1334.2
>
> We, therefore, find that the court erred in granting the motion to suppress. The assignment of error is well taken.

The State contends the Sheriff's detectives do not have to inform Mrs. Gleason of all of the objects of their search in order for her consent to be voluntary. In State v. Eglin, Summit Nos. 11168/11201, unreported, Ninth Judicial District (12/21/83), the police went to the Defendant's home in order to speak to the Defendant regarding a murder. When the police entered the

Defendant's home, the Defendant's father stated the Defendant was not home but that the police were free to look around. The police later found the Defendant and incriminating evidence in his bedroom. The Defendant contended his father's consent to search was not voluntary because the police did not inform the Defendant's father of the reason for their visit. This court rejected the argument finding that the consent was voluntary as long as it was not the product of coercion:

> Petitioner argues that the consent of Mr. Eglin was not voluntary as he was not informed of the reason for the officers' visit. However, the Supreme Court has made clear that voluntariness of consent is not to be tested in terms of waiver, i.e. whether the consent was knowingly and

> intelligently. Rather, voluntariness is found where, from the totality of the circumstances, it appears that the consent was not the product of governmental coercion. Schneckloth v. Bustamonte, supra. In the instant case, the officers simply requested to speak with defendant. In response, Mr. Eglin freely invited the police to look around. Under these circumstances, the trial court could reasonably conclude that Mr. Eglin's consent was voluntary and not coerced.

Here, the Sheriff's detectives did not use coercion to obtain the consent of Mrs. Gleason to search the Petitioner's house. The record indicates the detectives told Mrs. Gleason about her husband's charges and

asked her permission to search the house. Mrs. Gleason consented to a search of her house and signed a consent to search form. The police testified that they told Mrs. Gleason she had the right to refuse the consent search. The consent form also indicates Mrs. Gleason had the right to refuse to consent to the search. The consent in this case was voluntarily made. The Petitioner argues that the police deceived Ms. Gleason because they only told her they were looking for sexual photographs of children. However, the police did inform Ms. Gleason of the charges against her husband. Further, the State finds little difference between pornographic photos or pornographic films and comic books. The police did not use deception to obtain Ms. Gleason's consent to search in this case. Finally, the Sheriff's detectives

did not exceed the scope of the consent given by Mrs. Gleason. The search in this case was proper. The Petitioner's argument is without merit and must be overruled.

CONCLUSION

Pursuant to the argument offered, the Respondent respectfully contends that Petitioner's petition for a Writ of Certiorari shoiuld be denied, the Petitioner having presented no substantial constitutional issue, nor has any prejudicial error been demonstrated in the trial court proceedings.

A P P E N D I X

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

U.S. Const., Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATE OF OHIO)		IN THE COURT OF
)	ss:	APPEALS
COUNTY OF SUMMIT)		NINTH JUDICIAL DISTRICT
		C.A. NOS. 11168/ 11201
STATE OF OHIO)		APPEAL FROM
)		JUDGMENT ENTERED
Plaintiff-Appellee)		IN THE COMMON
)		PLEAS COURT
-vs-)		COUNTY OF SUMMIT,
)		OHIO CASE NO.,
JEFF PHILIP EGLIN)		CR 82 10 1201
)		
Defendant-Appellant)		

DECISION AND JOURNAL ENTRY

Dated: December 21, 1983

This cause was heard October 17, 1983, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

QUILLIN, P. J.

Defendant Jeff Eglin appeals from a conviction for the crimes of aggravated murder and aggravated burglary. We affirm.

As the evidence is conflicting, we note that in reviewing the facts we must construe the evidence in the light most consistent with the judgment. 5 Ohio Jurisprudence 3d 129, Appellate Review, Section 563.

On September 2, 1982, the Akron Police Department received a report that an 84 year old woman was found dead in her home. The discovery was made by a friend of the victim. Investigation indicated that the victim had been strangled and stabbed.

Discussions with witnesses revealed that in the early evening of September 1, 1982, a young man was seen with the victim at her home. The young man was described as wearing a windbraker type

jacket, faded blue jeans, and a red bandana. He was seen smoking a cigarette with a brown wrapper. Later, the police received an anonymous telephone call stating that defendant had been bragging about robbing and murdering an older woman. The police then checked the juvenile files and discovered that defendant had a history of burglary offenses in the area of the victim's home. Furthermore, defendant's residence was only a few blocks away from that of the victim.

Based on this information, several officers proceeded to defendant's home at approximately 11:30 p.m. Upon arriving they knocked on the door which was answered by defendant's sister-in-law. The officers requested to speak with defendant and were informed that he was not home. At that moment, Mr. Eglin, defendant's father, appeared at

the door. The police again asked to speak with defendant. Mr. Eglin replied that defendant was not home but that the police were free to look around. Responding to a request by the police, Mr. Eglin led them to defendant's bedroom. The police knocked on the bedroom door which was locked. After the police knocked a second time, defendant answered that he was trying to unlock the door. Then, one of defendant's brothers arrived with a key and opened the door. The officers entered the room where they observed defendant putting on a pair of faded blue jeans and rummaging through his sheets. The officer saw in plain view a red bandana, a box of More cigarettes (noted for their brown, as opposed to white, wrapper) and a knife. They further found under defendant's mattress, a wallet stuffed with an extraordinarily large amount of money.

Based on these observations, the officers suggested that defendant come to the detective bureau for questioning concerning a felony under investigation. Both defendant and his father stated that would be fine. Defendant requested to use the bathroom but headed toward another door. The officers then placed handcuffs on defendant as they feared he might attempt to flee.

Defendant was transported to the police station. While in the police cruiser, defendant was read his Miranda rights for the first of several times. At the police station, defendant was questioned about the incident for about an hour. Later, he was taken to the Juvenile Detention Center.

On September 3, 1982, at approximately 3:00 p.m., defendant was returned to the police station. After more interrogation, defendant confessed

to the murder. In the confession, defendant also disclosed that he had stolen some silverware. He then told the police that it was hidden in the attic of his home. The police returned to the Eglin residence and while there defendant's brother retrieved the silverware and gave it to the officers. The police later returned and conducted a more thorough search of the premises with the consent of defendant's mother.

Defendant, being 17 years of age, was brought before the juvenile court which ordered him to be prosecuted as an adult. On November 16, 1982, defendant was indicted on one count of aggravated murder and one count of aggravated burglary. A jury found him guilty of both offenses and he was sentenced by the court.

ASSIGNMENTS OF ERROR

"I. The court erred in denying the appellant's motion to suppress the evidence illegally seized at the time of his arrest in direct contravention of his statutory rights. The fourth Amendment rights under the United States Constitution. The Ohio Constitution.

"II. The court committed error when seized evidence was not suppressed at appellant's trial when the seizures flowed from an illegal arrest and without probable cause or warrant.

IV. The court erred in its 'finding and order' in overruling defendant-appellant's motion to suppress by declaring that the results of the search created probable cause where none had previously existed."

Prior to trial, defendant moved to suppress those items seized from the Eglin home. This motion was denied. As each of the above assignments of error deal with the motion to suppress, they will be considered together.

It is necessary to examine each step of police activity in chronological order to determine the validity of the ultimate seizure.

The initial presence of the police in the Eglin home was not without authorization. The officers were specifically invited by defendant's father to "look around" the house in search of defendant. Thus, the initial search was based upon the consent of one authorized to get it. Schneckloth v. Bustamonte (1973), 412 U.S. 218.

Defendant argues that the consent of Mr. Eglin was not voluntary as he was not informed of the reason for the

officers' visit. However, the Supreme Court has made clear that voluntariness of consent is not to be tested in terms of waiver, i.e. whether the consent was given knowingly and intelligently. Rather, voluntariness is found where, from the totality of the circumstances, it appears that the consent was not the product of governmental coercion. Schneckloth v. Bustamone, supra. In the instant case, the officers simply requested to speak with defendant. In response, Mr. Eglin freely invited the police to look around. Under these circumstances, the trial court could reasonably conclude that Mr. Eglin's consent was voluntary and not coerced.

Once inside the house the police queried as to the location of defendant's bedroom. Mr. Eglin responded by leading the police to the room. As the police entered defendant's

room, they saw in plain view the items described to the earlier. Police officers may seize clearly incriminating evidence which is discovered in a place where the officers are lawfully present. Washing v. Chrisman (1982), 455 U.S. 1; Coolidge v. New Hampshire (1971), 403 U.S. 443. Thus, as defendant concedes, the items found in plain view were admissible at trial.

More important than the seizure of these items is the information they provided the police. Probable cause to arrest exists when the facts and circumstances within the knowledge of the police are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense. Beck v. Ohio (1964), 379 U.S. 89. The Supreme Court has held that items discovered in plain view may be relied upon to provide probable cause

to arrest. Colorado v. Bannister (1980), 449 U.S. 1. Thus, the discovery of the previously described bandana, distinctive cigarettes, and knife taken along with the earlier telephone call provided the probable cause necessary to arrest defendant. Whiteley v. Warden (1971), 401 U.S. 560, 567.

Having probable cause to arrest defendant, the police were justified in searching the immediate surroundings. Chimel v. California (1969), 395 U.S. 752.

All subsequent searches of the Eglin residence were performed upon the consent of one authorized to give it. Schneckloth v. Bustamonte, supra.

From the foregoing, we find that the motion to suppress was properly overruled.

ASSIGNMENT OF ERROR
III

"The court erred in not suppressing appellant's statements made to the police after they flowed from an unlawful arrest and were induced under such conditions to render the statements constitutionally impermissible."

Defendant argues under this assignment of error that his confession, being improperly induced, should have been suppressed.

Throughout the interrogation process, defendant was advised of his constitutional rights no fewer than four times. Each time he stated that he understood his rights and was willing to waive them.

The totality of the circumstances must be considered when determining the voluntariness of a confession. State v. Barker (1978), 53 Ohio St. 2d 275, Syl. 2.

Defendant argues that as a minor, he is to be afforded special protection in the interrogation process. However, such added protection varies according to factors such as age, mental capacity, etc. State v. Bell (1976), 48 Ohio St. 2d 270, 277. Defendant was adjudicated competent to stand trial as an adult, and thus not entitled to as much protection as a very young child who is not capable of intelligently waiving his rights. State v. Bell, supra.

Defendant claims that he was intoxicated and highly fatigued during the interrogation. However, his confession came after he had been in custody for over 18 hours. The effects of any intoxicating substances which may have been consumed by defendant were certainly dissipated by then. As for fatigue, any such fatigue on the part of defendant was not the result of police

practice. For much of the time defendant was in custody, he was in a holding cell at the Juvenile Detention Center. There is no indication that he was not free to sleep there had he felt the need.

Based on the totality of the circumstances, it can only be concluded that defendant's confession was voluntarily given.

ASSIGNMENT OF ERROR
V

"The trial court erred in finding prior to trial, that the defendant, upon motion of the state, was under the age of eighteen, and could not be put to death upon conviction and therefore was not entitled to the statutory procedures guaranteed by the Ohio Revised Code, thereby denying defendant a fair jury."

Prior to jury selection, the court determined that since defendant was a minor, he would not be subject to the death penalty. Accordingly, the court ruled that voir dire could not contain questions concerning the views of the veniremen on the death penalty.

There is little question that aggravated murder is a capital offense even where the death penalty is unavailable. State v. Henry (1983), 4 Ohio St. 3d 44. However, where the death penalty is not to be considered by the jury and the jury is so instructed, the court may refuse questioning of the veniremen on that issue. State v. Davis (1978), 56 Ohio St. 2d 51; State v. Wade (1978), 53 Ohio St. 2d 182; and State v. Lane (1976), 49 Ohio St. 2d 77. In the instant case the court instructed the jury that the death penalty was not being sought by the state and could not

be considered by the jury. In light of this instruction, the court's ruling was not erroneous.

ASSIGNMENT OF ERROR
VI

"Defendant was denied his right to a speedy trial."

When a juvenile is charged with committing a felony, the time for a speedy trial pursuant to R.C. 2945.71 does not commence until the case is transferred to the grand jury for further proceedings against the defendant as an adult. State v. ex rel. Williams, v. Court of Common Pleas (1975), 42 Ohio St. 2d 433. Thus, the speedy trial time for defendant here did not begin to run until October 12, 1982, the date of transfer to the grand jury.

Defendant concedes that, pursuant to psychological evaluation, the time was tolled between November 29, 1982,

and March 1, 1983. Trial having commenced on April 5, 1983, defendant was brought to trial well within the 90 day time limit.

ASSIGNMENT OF ERROR
VII

"The court erred in allowing the jury to rehear the defendant's taped confession after being unable to reach a verdict."

The question of whether to permit the jury to review evidence after the jury has retired rests within the sound discretion of the trial court. State v. Berry (1971), 25 Ohio St. 2d 255, Syl. 4; and State v. Rollins (1976), 49 Ohio App. 2d 330.

As we have determined that defendant's taped confession was admissible, we fail to find a prejudicial abuse of discretion in permitting the jury to hear the confession a second time.

ASSIGNMENT OF ERROR
VIII

"The verdict of the jury was against the manifest weight of the evidence an should be overturned."

Judgments supported by substantial evidence upon which a jury could reasonably conclude beyond a reasonable doubt that all the elements of a crime have been proven will not be overturned as being against the manifest weight of the evidence. State v. Eley (1978), 56 Ohio St. 2d 169.

A review of the evidence, including defendant's confession, indicates substantial evidence to support the jury's verdict.

The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Summit Common

Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

_____
Presiding Judge
-for the Court-

MAHONEY, J.
GEORGE, J.
CONCUR

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